92-1949

No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert L. Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on March 11, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), is reprinted as Appendix A.

The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Davis*, No. 89 2569 (N.M.C.M.R. September 16, 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on March 11, 1993. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATEMENT OF THE CASE

Petitioner was found guilty of one count of unpremeditated murder, in violation of 10 U.S.C. § 918. At trial, petitioner moved to suppress admission of his statements made during a custodial interrogation to agents of the Naval Investigative Service on November 4, 1988. Petitioner argued that he requested a lawyer during the interview. However, one of the agents testified that petitioner only said, "maybe [he] should talk to a lawyer." The agents did not attempt to obtain a lawyer for petitioner, but instead clarified petitioner's request before they continued to interrogate him. The trial judge denied petitioner's motion to suppress, finding that petitioner's statements during interrogation did not invoke his right to counsel. Thereafter, the military judge sentenced appellant to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to pay grade E-1.

Upon subsequent review, in an unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence below. *United States v. Davis*, No. 89 2569 (N.M.C.M.R. September 16, 1991). The Navy-Marine Corps Court of Military Review did not specifically address the issue raised in this petition.[1] App. B.

[1] This issue was expressly raised before the Navy-Marine Corps Court of Military Review.

On appeal, pursuant to 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed appellant's conviction. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993). The Court of Military Appeals affirmed on the ground that the agents properly clarified appellant's request before continuing the interrogation. App. A, p. 11a.

REASON FOR GRANTING THE WRIT

A SPLIT AMONG VARIOUS STATE AND FEDERAL COURTS EXISTS OVER WHAT STANDARD A COURT SHOULD USE FOR DETERMINING THE CONSEQUENCES OF AN AMBIGUOUS REQUEST FOR COUNSEL.

Three conflicting standards are used by state and federal courts for determining the consequences of an ambiguous request for counsel during a custodial interrogation. *Smith v. Illinois*, 469 U.S. 91, 95-96 and n.3 (1984). The Court should resolve this conflict in order to ensure consistency among the lower courts in their approach to this issue. As Justice White observed in a recent order denying a petition for writ of certiorari on this issue:

> [I]t is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment [after making an ambiguous request for counsel.] [B]ecause of the different approaches taken by the lower courts, I would grant certiorari.

Mueller v. Virginia, 113 S.Ct. 1880, 1881 (1993) (White J., dissenting).[2]

[2] Justice Blackmun and Justice Souter joined in the dissent.

An accused who invokes his right to counsel during a custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless the accused initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *See Miranda v. Arizona*, 384 U.S. 436, 474 (1966).[3] However, this Court has left unresolved the issue of whether the *Edwards* bright-line rule applies when an accused makes an ambiguous invocation of his right to counsel. *Smith v. Illinois*, 469 U.S. at 96. The Court should issue a writ of certiorari in order to resolve this issue.

Some courts have adopted the position that all questioning must cease once a suspect mentions the word "attorney" or "counsel." *See, e.g., Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People v. Alexander*, 261 N.W.2d 63 (Mich. 1977), *cert. denied sub nom Michigan v. Borman*, 436 U.S. 958 (1978); *People v. Superior Court of Mono County*, 542 P.2d 1390, 1394-95 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976). These courts have based their reasoning upon a broad reading of *Miranda*'s requirement that all questioning stops once an accused "indicates in any manner" that he wants to speak with an attorney. *Maglio v. Jago*, 580 F.2d at 205.

In stark contrast to those decisions, some courts have taken a more conservative approach, holding that there exists a threshold of clarity which an accused must reach before he has invoked his right to counsel. *See, e.g., Virginia v. Mueller*, 422 S.E.2d 380, 387 (Va. 1992), *cert. denied*, 113 S. Ct. 1880 (1993); *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Dean v. Commonwealth*, 844 S.W.2d 417, 420 (Ky. 1992); *Russell v. State*, 727 S.W.2d 573, 575

[3] "The bright-line rule of *Edwards* also applies to military interrogations." *United States v. Applewhite*, 23 M.J. 196, 198 (C.M.A. 1987).

(Tex. Crim. App. 1987) (en banc), *cert. denied*, 484 U.S. 856 (1987). These courts have attempted to restrict the scope of *Edwards* to only situations where an accused has "clearly asserted" his right to counsel. *Virginia v. Mueller*, 422 S.E.2d at 387.

As a compromise position, other courts, including the court below, have adopted a third approach, where all questioning must cease except for narrow questions to clarify the earlier ambiguous request. *See, e.g., United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985); *Towne v. Dugger*, 899 F.2d 1104 (11th Cir. 1990), *cert. denied*, 498 U.S. 991 (1990). These courts have attempted to strike a balance between the rights of the accused and prosecutorial interests. By applying this standard, the United States Court of Military Appeals has joined the division among the courts. App. A, p. 10a.

In applying the third approach, the court below failed to apply the correct standard for determining the consequences of an ambiguous request for counsel. App. A, p. 10a. The appellate court below should have followed the first approach which would have required the interrogators to cease all questioning once the petitioner mentioned the word "attorney."[4] This approach allows a qualified attorney to clarify an accused's request, and also protects an accused from being badgered by police officers to answer further questions when he wants to invoke his fundamental right to counsel.

[4] In addressing questions involving waiver of counsel rights, the Court has given a broad interpretation to a defendant's request for counsel. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

CONCLUSION

Petitioner asks the Court to resolve the issue of what standard a court should use for determining the consequences of an ambiguous request for counsel during a custodial interrogation. In doing so, the Court will resolve the split among the lower courts on this important question of Constitutional law and ensure that all defendants are treated equally. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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June 1993

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,458
NMCM 89 2569

UNITED STATES, APPELLEE

v.

ROBERT L. DAVIS, OPERATIONS SPECIALIST SEAMAN APPRENTICE, U.S. NAVY, APPELLANT

Argued Nov. 3, 1992.
Decided March 11, 1993.

For Appellant: *Lieutenant Mary Anne Razim-Fitzsimmons*, JAGC, USNR (argued); *Lieutenant Franklin J. Foil*, JAGC, USNR.

For Appellee: *Captain Brett D. Barkey*, USMCR (argued); *Colonel T.G. Hess*, USMC and *Lieutenant Ralph G. Stiehm*, JAGC, USNR (on brief); *Commander W.F. Shields*, JAGC, USN.

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members convicted appellant of unpremeditated murder, in violation of Article 118, Uniform Code of Military Justice,

10 USC § 918. His approved sentence provides for a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated September 16, 1991.

This Court granted review of the following issues:

I

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN AFFIRMING THE TRIAL JUDGE'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS BOTH HIS POOL CUES, AND ALL STATEMENTS MADE TO NAVAL INVESTIGATIVE SERVICE AGENTS ON 20 OCTOBER 1988, AS PRODUCTS OF AN UNWARNED INTERROGATION IN VIOLATION OF HIS ARTICLE 31(b) RIGHTS.

II

WHETHER THE TRIAL JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO NIS AGENTS DURING THE 4 NOVEMBER CUSTODIAL INTERROGATION.

Factual Background

Seaman Apprentice Keith Shackleton was found dead behind the commissary at Charleston Naval Base at approximately 5:30 a.m. on October 3, 1988. Shackleton was last seen alive playing pool at the Charleston Naval Base Enlisted Mens' Club on the evening of October 2. He died of head injuries inflicted with a blunt object. During the ensuing investigation Naval Investigative Service (NIS) agents interviewed "maybe a hundred to two hundred and fifty people." The interview notes of NIS Special Agent (SA) Baldwin indicate that appellant was one of several persons interviewed at the Enlisted

Mens' Club on the evening of October 14, 1988, but the contents of that interview were not established on the record.

On October 17, SA Sentell, the lead agent in the investigation, was informed by a pathologist that "the injuries look to be consistent with a long tubular shock-absorbing object." The pathologist told SA Sentell that "a pool cue, butt end of a pool cue stick could have been used."

On October 18, SA Sentell interviewed two sailors, who told her that appellant was at the club on the night of October 2 until near closing time. The NIS agents also learned, from sources not mentioned in testimony, that only personally owned pool cues were allowed to be removed from the Enlisted Mens' Club. The NIS then began trying to determine which patrons of the Enlisted Mens' Club owned their own pool cues.

On October 19, NIS agents Sentell and Clark went aboard appellant's ship to interview him, but he was absent without authority. On October 20, they determines that appellant was present for duty and returned to his ship to interview him. They informed appellant's command that appellant was "a possible witness."

Before they interviewed appellant on October 20, SA Clark and SA Sentell were informed by the ship's executive officer that appellant was being referred to medical authorities for a mental status evaluation. SA Clark testified that he was informed that appellant "had made a statement regarding wanting to shoot somebody." SA Clark concluded that appellant "was prone to making statements of that nature," but he did not regard the information as pertinent because "we were not looking at a victim of a shooting." SA Sentell testified that she was informed that appellant had said "he might need to kill a cop" and that the command was concerned about appellant's "mental stability."

Prior to interviewing appellant, SA Clark interviewed Petty Officer Guidry. Guidry had heard appellant say that he heard (from another person) that Shackleton had been "hit and jabbed with a pool stick." The cause of Shackleton's death was not common knowledge, and SA Clark regarded this information "as intimate information regarding the manner of death."

When he was interviewed by the NIS on October 20, appellant was restricted to his shop because of prior misconduct unrelated to the murder of Shackleton. Appellant was escorted to the interview room aboard ship by Petty Officer Smith, a master-at-arms. Smith told the NIS agents that appellant had told him (Smith) "that he didn't kill [Shackleton], but he knew who did and he wasn't going to tell unless it looks like he was going to get blamed for the death."

Appellant was not advised of his Article 31(b)* rights prior to being interviewed by SA Clark and SA Sentell, because they did not consider him a suspect. Appellant was shown a photograph of Shackleton and said that he recognized him because he had "shot pool with him." Appellant confirmed that he was at the club on the evening of October 2. Regarding Shackleton's death, appellant "said that he had heard that the guy was beaten with a pool stick from Bonnie and Wade—Bonnie Krusen and Wade Bielby." Appellant told the NIS agents

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* Article 31, Uniform Code of Military Justice, 10 USC § 831, provides in pertinent part as follows:

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

that he owned two pool cues. SA Sentell described appellant's attitude during the interview as "[v]ery cooperative." The entire interview lasted about 30 minutes.

Appellant led the NIS agents to his girlfriend's house, where he removed a case containing two pool cues from his girlfriend's automobile and gave them to SA Clark. This agent told appellant that he would like to examine the pool cues, at which time appellant pointed out a spot on the pool cue case. Appellant first said that the spot was catsup, but then he said it might be his own blood.

Appellant's service records were obtained by the NIS agents on October 25. Those records reflect that appellant was absent from his duty station on the morning of October 3, the day that Shackleton's body was found, but both SA Clark and SA Sentell testified that they did not review appellant's service records until after October 20 and that they were unaware of his unauthorized absence on October 3 when they interviewed him on October 20.

Appellant was neither the first nor the last witness interviewed, nor was he the first or last who was asked to produce his pool cue for examination. SA Clark testified that one other pool cue had been "collected" from "Kaiser" and examined prior to the interview with appellant. Bonnie Krusen and Wade Bielby, who had been interviewed prior to appellant, were interviewed again after appellant mentioned them, along with "a lot" of other witnesses. The NIS also obtained pool cues from Bonnie Krusen and Wade Bielby.

On November 1, SA Clark interviewed Petty Officer Mull, who informed SA Clark that appellant had admitted killing Shackleton. At that point the NIS agents regarded appellant as a suspect.

On November 4, 1988, appellant was escorted to the NIS office to be interviewed. SA Sentell advised him of his Article 31(b) rights and his right to counsel. Appellant executed a written waiver of his rights. SA Sentell orally asked appellant "if he would answer some questions" and appellant responded that he would "because he didn't kill anyone." The interview began at about 4:30 p.m.

SA Sentell testified that at approximately 5:53 p.m., appellant said, "Maybe I should talk to a lawyer." She then stopped questioning appellant about the offense. When asked if she did anything to clarify appellant's comment, she testified:

> [We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it."
>
> Q. So, as you were clarifying whether or not he wanted a lawyer, the accused specifically said that he did not, correct?
>
> A. Correct.
>
> Q. And then he went on and he initiated further conversation beyond that?
>
> A. Yes, he did.

The NIS agents took a short break after questioning appellant about his desire for counsel. Before resuming questioning, they briefly reminded appellant of his rights

but did not repeat the advice in full or execute another written waiver. SA Sentell testified that, a short time later, at approximately 6:57 p.m., appellant said, "I think I want a lawyer before I say anything else." At that point questioning ceased. SA Sentell testified, "That was the end of the interview, and we called the ship."

Appellant described his comment about a lawyer during the November 4 interview as follows:

> Well, they were talking to me, and I said, "Well, I'd like a lawyer," and they said, "We'll take a break," and they walked out and left me handcuffed to the chair, and an older guy came in and stood by the door watching me.

Appellant testified further that, after a short break, "They came back in and started questioning me again."

SA Clark testified that appellant orally denied killing Shackleton. Appellant initially said that his girlfriend was with him at the club, but when confronted with her denial that she was at the club on the night of October 2, appellant said that he was at the club "with three other friends."

The defense made timely motions to suppress the pool cues surrendered by appellant on October 20 and the results of the November 4 interrogation. The military judge denied both motions to suppress.

The October 20 Interview

Appellant contends that the military judge erred by refusing to suppress the fruits of the October 20 interview, including appellant's production of the pool cues and his explanation for the spot on the pool cue case. Appellant argues that he was a suspect on October 20 and that failure to advise him of his rights as a suspect made the fruits of the interview inadmissible.

Whether a person being interviewed is a "suspect" is a question of law. *United States v. Good,* 32 MJ 105, 108 (CMA 1991). The military judge's factual determinations pertaining to what criminal investigators knew at the time of the interview will be upheld unless "clearly erroneous"; but the legal issue whether the person being interviewed was a suspect will be reviewed *de novo. Id.; United States v. Uribe-Velasco,* 930 F.2d 1029, 1032 (2d Cir. 1991). If a criminal "investigator suspects or reasonably should suspect" a person "of a crime, then rights' warnings are required." *United States v. Schake,* 30 MJ 314, 317 (CMA 1990).

We hold that appellant was not a suspect when he was interviewed on October 20. The NIS had determined that a pool cue was the probable murder weapon, but they were still trying to determine how many patrons of the Enlisted Mens' Club had privately owned pool cues. As of October 20, they had obtained one or two; appellant's was the second or third. They did not know how many they eventually would find. They ultimately found a total of four. Appellant's "intimate information" about the murder was attributed to third parties. Appellant was a known disciplinary problem, but his bizarre comments about killing someone appeared to be directed at the police, not fellow pool players. Furthermore, appellant's comments concerned shooting someone, but the NIS was not investigating a shooting death. We agree with the military judge that, as of October 20, the investigation had not sufficiently narrowed to make appellant a suspect within the meaning of Article 31.

The Novembrer 4 Interview

Appellant contends that the fruits of the November 4 interview should not have been admitted in evidence

because they were obtained after he requested a lawyer. We hold that the limited results of the November 4 interview were properly admitted in evidence.

When an accused has invoked his right to have counsel present during a custodial interrogation, questioning must cease. *United States v. Applewhite,* 23 MJ 196, 198 (CMA 1987). The conflict between SA Sentell's description of what appellant said during his interrogation and appellant's description of what he said raised a ;question of fact which the military judge resolved against appellant. The military judge did not believe appellant's description of an unequivocal invocation of his right to counsel. Instead, he found that "the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel."

The military judge's findings of fact should not be disturbed unless unsupported by the record or clearly erroneous. *United States v. Burris,* 21 MJ 140, 144 (CMA 1985), citing *United States v. Middleton,* 10 MJ 123, 133 (CMA 1981). In this case the military judge's rejection of appellant's assertion that he told the NIS, "I'd like a lawyer," is a finding of fact. The question whether appellant's statement, "Maybe I should talk to a lawyer," invoked his right to counsel is a question of law. We hold that, because this comment by appellant did not unequivocably invoke his right to counsel, the NIS agents properly conducted further limited questioning to clarify appellant's ambiguous comment.

Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the

right to counsel and have held that comments falling short of the threshold to not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that all "all interrogation" about the offense "must immediately cease" whenever a suspect mentions counsel, but they allow interrogators to ask "narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *See Smith v. Illinois*, 469 U.S. 91, 96 n. 3, 105 S.Ct. 490, 493 n. 3, 83 L.Ed.2d 488 (1984) (summarizing approach taken by various jurisdictions to ambiguous references to counsel). The Supreme Court has not yet resolved the issue. *Id.*

Not every vague reference to counsel requires termination of the interrogation. An ambiguous reference to counsel must, however, be clarified before interrogation may continue. *United States v. Mendoza-Cecelia,* 963 F.2d 1467, 1472 (11th Cir. 1992); *United States v. Fouche,* 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); *United States v. Cherry,* 733 F.2d 1124, 1130 (5th Cir. 1984). *Cf. United States v. Sager,* 36 MJ 137, 145 (CMA 1992) (limited questioning permitted to clarify whether ambiguous conduct was intended to invoke right to silence). Further questioning is limited to clarifying the suspect's desires regarding counsel. The interrogator may not attempt to persuade the suspect that counsel is not necessary or desirable, or presume to tell the suspect what counsel's advice is likely to be. *United States v. Cherry,* 733 F.2d at 1130.

In this case, appellant's comment, "Maybe I should talk to a lawyer," required clarification. *See United States v. Cherry,* 733 F.2d at 1130 ("Maybe I should talk to an attorney before I make a further statement."). SA Sentell immediately stopped questioning appellant about

the murder and limited her questioning to appellant's comment about counsel. After appellant said, "No, I don't want a lawyer," the interrogators took a break, allowing appellant to consider his situation. After the break, they briefly reminded appellant of his rights before continuing the interrogation. *Cf. Maglio v. Jago,* 580 F.2d 202, 206 (6th Cir. 1978) ("If the police had reexplained Maglio's rights and then withdrawn, allowing the boy to consider his alternatives, and he had then initiated further communication with the police, we would be able to find a waiver. . . ."). Under the circumstances, we agree with the military judge's ruling that appellant did not invoke his right to counsel at this point in the interrogation.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and WISS concur.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

BEFORE

C. H. MITCHELL J.A. FREYER F. D. HOLDER

UNITED STATES

v.

ROBERT L. DAVIS, 302 60 5400
OPERATIONS SPECIALIST SEAMAN APPRENTICE (E-2),
U.S. NAVAL RESERVE

NMCM 89 2569 Decided 16 September 1991

Sentence adjudged 13 April 1989. Military Judge: Sebastian Gaeta, Jr. Review pursuant to Article 66(c), USMJ, of General Court-Martial convened by Commander, Naval Base, Charleston, SC 29408-5100.

LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel
LT KIRK A. LUDWIG, JAGC, USNR, Appellate Government Counsel
LT L. LYNN JOWERS, JAGC, USN, Appellate Government Counsel
LCDR NEAL H. NELSON, JAGC, USNR-R, Appellate Government Counsel

PER CURIAM:

The appellant was convicted of unpremeditated murder for killing another servicemember by striking him in the head with a pool cue. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement for life. The convening authority approved the adjudged sentence. He has raised several assignments of error[1], of which we discuss only the first.

Whether or not the appellant was a suspect when the questioning by the Naval Investigative Service leading to production of the pool cue took place depends upon the totality of the circumstances known to investigators at the time. Information, however, need not be only

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[1] I. THE MILITARY JUDGE ERRED BY IMPROPERLY DENYING APPELLANT'S PRETRIAL MOTIONS TO SUPPRESS HIS UNWARNED STATEMENTS TO NAVAL INVESTIGATIVE SERVICE [NIS] AGENTS AND EVIDENCE DERIVED THEREFROM.

II. THE MILITARY JUDGE ERRED BY IMPROPERLY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED BY NIS AGENTS IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL.

III. TRIAL COUNSEL'S INAPPROPRIATE SENTENCING ARGUMENT HAS TAINED APPELLANT'S SENTENCE.

IV. THE MILITARY JUDGE ERRED BY DENYING TRIAL DEFENSE COUNSEL'S REQUEST FOR AN ADDITIONAL INSTRUCTION ON REASONABLE DOUBT.

V. THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS UNWARNED ADMISSIONS TO A PETTY OFFICER.

THE MILITARY JUDGE ERRED BY DENYING TRIAL DEFENSE COUNSEL'S REQUEST TO REOPEN THE ARTICLE 32 INVESTIGATION.

additive or neutral; some, by virtue of its exculpatory nature, may subtract from or diminish that which is inculpatory so as to neutralize suspicion which might otherwise exist. In fact, the potential of further information, if exculpatory, to vitiate otherwise existing probable cause has been so well recognized that material omission of such information from an affidavit has been placed on an equal footing with insertion of false statements as a basis for challenging the validity of a warrant. *United States v. Pace,* 898 F.2d 1218, 1232-33 (7th Cir. 1990). Hence, it will not do merely to enumerate circumstances which, in isolation, might give rise to suspicion; the totality of the circumstances known to the investigators, including any exculpatory information, must be considered.

In this case, the investigators had information from which a reasonable person might have suspected the appellant of some involvement; but they also had information in the form of reported statements of the appellant from which any reasonable person would conclude that the appellant, although knowledgeable, could not have been the murderer. We do not see any way that the appellant's statements that he had heard of how the victim might have been killed could be interpreted otherwise than as a denial of personal involvement and guilt on his own part. Since no other information focused with particularity upon the appellant as the only likely perpetrator, we think that the appellant's inferential denials of involvement, when considered with the other information, resulted in a condition of objective non-suspicion on the part of the Naval Investigative Service. Consequently, even if the production of the pool cue is deemed derivative of interrogation, we hold that warnings were not initially required under all the circumstances of this case.

The assignments of error are without merit. We are convinced of the appellant's guilt, which he has admitted on at least two occasions, beyond a reasonable doubt, and we deem the sentence appropriate for this wanton and senseless homicide. Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

C. H. Mitchell, Senior Judge

J. A. Freyer, Judge

F. D. Holder, Judge